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No. 97-1569

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

ROBERT MAURICE BLOOM, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Whether the existence of a purported Sixth Amendment rule, imposing a duty upon criminal defense counsel to identify and provide a defense expert information the expert might find relevant in rendering a non-legal opinion, was so settled that it became permissible under the *Teague v. Lane* doctrine for the Ninth Circuit to enforce the rule retroactively to grant habeas corpus relief to a state prisoner.

2. Whether the "prejudice" necessary to a Sixth Amendment claim of ineffective counsel under *Strickland v. Washington* requires, beyond a showing of probable effect on the actual outcome of the trial, a determination that counsel's deficient performance rendered the trial fundamentally unfair or unreliable.

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In his opposition to the certiorari petition, the prisoner Bloom alleges (1) that the State did not raise the *Teague v. Lane* retroactivity issue [Question Presented No. 1] in the district court or the court of appeals and (2) that the State did not raise the *Lockhart v. Fretwell* ineffective-counsel issue [Question Presented No. 2] in the district court. (Opp. 11, 12, 14.) Neither assertion has merit as a ground to deny certiorari.

1. The Teague Question.

The *Teague* issue concerns the retroactivity of a rule purporting to impose upon trial counsel a Sixth Amendment obligation to identify and provide, for a defense mental-state expert, documents the expert might find relevant in arriving at his opinion. Although it is true that the State did not rely upon the *Teague* doctrine in the district court, that omission is of little consequence in light of the fact that the district court in the end rejected petitioner's ineffective-counsel claim on the merits

anyway.[1] (See *Schiro v. Farley*, 510 U.S. 222, 228-9 (1994) (State can raise *Teague* for first time on appeal from judgment in its favor); see also Stern & Gressman, *Supreme Court Practice,* 116-129 (7th ed.) (discussing special federalism obstacles arising from inadequate presentation of certiorari question in state, rather than federal, courts). When petitioner raised the claim on appeal to attack the judgment, the State generally explained the *Teague* doctrine in its brief (Appellee's Br., 37-8); and the State asserted it specifically in a footnote in defense of the district court's judgment on this very point (*id.* at 55 & n. 37). (See Appendix [excerpt of argument from State's appellate brief].) Petitioner had ample opportunity to reply.

Petitioner asserts that the State's *Teague* defense below differs from the *Teague* question it presents now. (Opp. 12.) Although Bloom recited in his appeal that the defense expert in fact had requested information from trial counsel, Bloom's legal argument in his opening brief in the court of appeals more broadly proffered a purported rule that "[w]hen an attorney has chosen to pursue a psychiatric defense, he must properly prepare and present the expert testimony relevant to that defense," including "ensuring that [expert witnesses] possess the background material needed to offer a professionally adequate opinion . . ." (Appellant's Opening Br., 66-71.) The State responded to that claim on the merits, and further asserted in a footnote that petitioner's contention amounted to a plea for a 'new rule' under *Teague*.

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1. The district court ruled that, "[i]n the absence of a specific request, an attorney is not responsible for gathering background material that might be helpful to a psychiatrist evaluating his client. Accordingly an attorney cannot be held incompetent for failing to gather such documents." (Appendix B, Pet. for Writ of Certiorari, p. 14.)

(Appellee's Br., 55 at n. 37.) Bloom made a broa contention; and the State responded that the contentio was *Teague* barred.

It is hypertechnical for Bloom to say now that th State had limited its *Teague* defense only to a mor specific rule that would have imposed a sixth amendmer obligaton on trial counsel in the absence of a specif request for information by the expert. (Opp. 12 Although the State indeed had characterized petitioner contention as one that would impose a new obligation o counsel even in the absence of a request by the expert fo information, the State should not be required to do mor than respond to the argument that the petitione apparently presented. In any event, the State did more Intertwined with its argument that petitioner's contentio was barred by *Teague,* the State cited *Card v. Dugger,* 91 F.2d 1494 (11th Cir. 1990) -- by way of quoting fro *Hendricks v. Calderon,* 70 F.3d 1032 (9th Cir. 1995) -- a a relevant case that involved, not the absence of a expert's request for information, but the lack of indicatio that the experts had considered themselves otherwis incapable of rendering an opinion. And, more generally the State already had argued that *Teague* required Bloom to show how the legal landscape at the time of finality o his conviction "dictated" the constitutional rule upon whic he was relying in seeking relief. (Appellee's Br. 38.) Th State's *Teague* defense, when asserted at all, was therefor necessarily co-extensive with the actual scope of the "rule actually proferred by Bloom in his own legal contentions That *Teague* defense aligns with the *Teague* questio presented here.

Petitioner speculates that the Ninth Circuit rejecte the State's *Teague* defense on grounds that it had not bee raised in the lower court. But the Ninth Circuit retains a hoc discretion to hear a *Teague* claim for the first tim even in a rehearing petition. See *Boardman v. Estelle,* 95 F.2d 1523, 1536 (9th Cir. 1992). Nothing in the panel

opinion ever stated or implied that the State had waived its *Teague* defense to the claim. (Cf. *Boardman,* at 1536-37.)

2. The Fretwell Question.

The *Fretwell* issue, concerning the standard of prejudice required to make out a violation of the right to effective counsel, indeed was raised by the State in the district court. In an April 1993 memorandum setting out the State's "theory of the case," filed in the district court shortly after *Fretwell* was decided by this Court, the State cited *Fretwell* in support of its specific argument that outcome-determination, as opposed to unfairness or unreliability, was insufficient to show the prejudice prong of the sixth amendment violation.[2/] The district court denied petitioner's ineffective-counsel claim. In responding to petitioner's appeal from the district court judgment, the State again cited *Fretwell* in its appellee's brief and again argued that a showing by petitioner of

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2. In the district court, the State argued: "Even if the 'different result' element were met, that alone, while necessary, is insufficient to prove prejudice. In *Fretwell,* the court reiterated its earlier holding that the 'defendant could not show Strickland prejudice merely by demonstrating that the outcome would have been different but for counsel's behavior.' . . . 122 L.Ed.2d at p. 120, fn.3. The *Fretwell* court, also relying on *Nix v. Whiteside,* 475 U.S. 157, . . . stated that if petitioner 'was deprived of neither a fair trial nor of any specific constitutional rights to guarantee a fair trial, he has suffered no prejudice,' even if a more favorable result would have occurred . . . . [R]espondent contends that trial counsel's performance satisfied the constitutional obligations of due process and reasonable investigation in that he obtained access to a qualified psychiatrist and he investigated the mental defense to the extent the psychiatrist presented unconditional testimony in support of the defense theory. The defense was legally plausible and responsive to the facts such that it was sufficient to establish a reliable result." (Memorandum of Contentions of Fact, filed 4/27/93, *Bloom v. Vasquez,* CV 90-2581.)

effect on the outcome, rather than unfairness and unreliability, was not enough. (Appellee's Br. 69-71.)[3]

CONCLUSION

For these reasons, and the reasons cited in the State's petition, the State respectfully requests that this Court issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

Dated: May 21, 1998.

Respectfully submitted,

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3. A statement on page 6 of the State's petition, however, must be corrected. There the petition asserts that neither the Ninth Circuit's conclusion that the expert indeed had requested information from trial counsel, nor its account of what such information would have comprised, played a role in the holding on appeal. The conclusion about whether there had been a request indeed played a role, albeit an unjustified one, in the appellate court's decision. The court's error with respect to that conclusion is the very basis for the *Teague* issue the State raised in the petition.

APPENDIX

EXCERPT OF ARGUMENT FROM STATE'S APPELLATE BRIEF

D. DUTY TO PREPARE EXPERT WITNESSES

In spite of the conclusions of the forensic experts that Dr. Kling had much more than the normal amount of information provided to a psychiatrist under the circumstances, petitioner contends trial counsel was obligated to take responsibility for knowing exactly what information a psychiatrist needs to come to a valid psychiatric conclusion. (AOB 66). That contention has been resoundingly decided against petitioner.

In the first place, respondent submits that Dr. Kling had a significant and sufficient quantum of information upon which to form his opinion regardless of the materials he did not have. Moreover, what Dr. Kling had was representative of all of the materials he claimed at the evidentiary hearing he would like to have had. It is not ineffective to refrain from obtaining materials that are not essential to the determination of petitioner's state of mind at the time of the crimes. Deep and extensive background materials might be valuable in a therapeutic setting, but the forensic experts below, in addition to Dr. Kling, were unanimous that the essentials in a forensic context are the facts of the case and the subject before them.

Furthermore, Dr. Kling never told Edelberg he had insufficient materials to form a conclusion and make a report. Dr. Kling never asked for additional time to interview petitioner. He never met with petitioner's mother in order to follow up on any of the materials she had provided. (HT-1 426.) Even though Dr. Kling had the description and phone number of the mental health professional who had seen petitioner following petitioner's earlier robbery, Dr. Kling did not call that number and seek further information. (HT-1 427-28.) Dr. Kling did not include in his written reports or trial testimony that his

opinion was conditional nor did he apply any qualifications to his opinion. In fact, Dr. Kling would not have testified to anything he did not believe was medically accurate and defensible. (HT-1 428-29.) Dr. Stalberg testified it was the psychiatrist's obligation to ask for more materials if more were necessary and to included any qualifications of an opinion in his report. (HT-1 574.) That expert forensic conclusion has been accepted as the law in this circuit.

In *Hendricks v. Calderon*, 70 F.3d 1032, a trial attorney provided his experts with "the limited information on Hendricks in his possession, that is, the confession and the police reports." *Id.* at 1037. Even though the "limited information" provided by Hendricks' attorney was substantially less than the "real chunk of information" provided to Dr. Kling, Hendricks' experts, [sic] neither requested "further background information on Hendricks from [his attorney] or qualified their conclusions due to insufficient information on their patient." *Id.* The same can be said of Dr. Kling. On appeal, Hendricks was of the view that his attorney "was dutybound to interview Hendricks' family members and friends, to obtain medical, school, and employment records, to otherwise verify Hendricks' autobiography and pass this information on to his mental health experts." *Id.* at 1038. As here, Hendricks' appellate argument was that his experts' opinions could not be meaningful, "[w]ithout such background material." *Id.* Again, as here, Hendricks argued on appeal that:

> trial counsel had a duty to provide the experts with his client's family social history, even absent any request from the experts. He argues that counsel's failure to do so undermines the expert's conclusions to such any extent that they cannot provide an adequate basis on which the attorney could make strategic choices.

Id.

This Court rejected such a contention and concluded:

> Neither reason nor the existing authority would lead one to conclude that an attorney in 1980 had such an affirmative constitutional duty. [37] Although this Court has not specfically addressed this question, the Eleventh Circuit and the Central District of California have studied the matter. Facing the identical issue this case presents, the Eleventh Circuit concluded that an attorney "was not obligated to track down every record that might possibly relate to [the defendant's] mental health and could affect a diagnosis." *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990). In that case, as here, there was "no indication that the experts felt incapable of basing their conclusions on the information they obtained through their own testing and examination . . ." *Id.* Similarly, the Central District of California has held, "In the absence of a specific request, an attorney is not responsible for gathering background material that might be helpful to a psychiatrist evaluating his client." *Bloom v. Vasquez*, 840 F.Supp. 1362, 1370 (C.D. Cal. 1993).

Id.

As is obvious from the above citation, this Court in *Hendricks* cited the district court opinion in this very case for the proposition that trial attorneys are not responsible for gathering every bit of background material that might be of assistance to a psychiatric expert. In concluding that it was not the trial attorney's responsibility to determine what psychiatrists needed, *Hendricks* went on to say:

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37. This Court's unambiguous finding that no authority supports petitioner's contention by definition makes that contention the request for a "new rule" and unavailable to him in these collateral proceedings. See *Teague v. Lane*, 489 U.S. at 301.

> To now impose a duty on attorneys to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for information from an expert, would defeat the whole aim of having experts participate in the investigation. . . . To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert . . . . If an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous.

Id. at 1038-39.

After ruling it was not a trial attorney's duty to do the work of psychiatric experts, this Court in *Hendricks* further concluded in the context of a trial attorney's constitutional duty to provide competent counsel:

> To hold otherwise would raise the Sixth Amendment hurdle well above the floor of minimal competence, requiring attorneys to have the specialized knowledge to evaluate an expert's conclusions before relying upon them in making strategic choices. By forcing lawyers to second-guess their experts, the position Hendricks argues would effectively eliminate the legitimate role experts play in guiding and narrowing an attorney's investigation.

Id. at 1039.